

September 13, 2010

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Room TWB-204
Washington, D.C. 20554

Re: Written Ex Parte Submission of UTEX Communications Corporation, *In the Matter of Petition of UTEX Communications Corporation, Pursuant to Section 252(e)(5) of the Communications Act, for Preemption of the Jurisdiction of the Public Utility Commission of Texas Regarding Interconnection Disputes with AT&T Texas* (Renewed Petition), WC Docket No. 09-134

Dear Ms. Dortch:

Petitioner UTEX files this written ex parte to bring certain matters to the Commission's attention regarding representations made by both AT&T and the Texas PUC ("TPUC") concerning the statutory deadline that was in effect at the time TPUC originally abated the underlying arbitration case over UTEX's strong objection.

TPUC's Reply Comments on page 4 asserts that, "Given the history of the UTEX arbitration, and particularly that UTEX itself sought extensions pushing the arbitration beyond the nine-month time frame when that period would begin to run is unclear." AT&T makes a similar argument on page 5, note 11. These two statements blithely misrepresent the record and the facts.

TPUC's assertion quoted above references in footnote 9, "Public Utility Commission of Texas' Response to Petition of UTEX Communications Corporation for Preemption under 47 U.S.C. § 252(e) (filed July 27, 2009) at 2 & Exh. A." The TPUC, in its Exhibit "A" states that "February 2006: UTEX proposes another extension to the procedural schedule, with a March 2006 hearing and an arbitration award by May 2006." The TPUC suggests that this February 2006 filing evidences UTEX's request for "pushing the arbitration beyond the nine-month time frame."

A copy of the only filing made by UTEX in February 2006 addressing scheduling is attached, and reveals that the TPUC is wrong. The attached letter demonstrates that UTEX offered – contingent on several other things – to enter a new stipulation regarding the starting date for calculation which

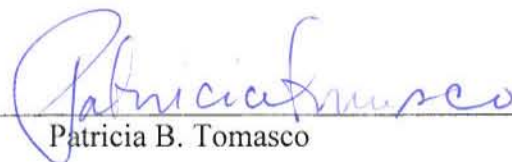
would have the effect of moving the deadline farther out in time.¹ The TPUC never accepted that offer. Therefore, the statutory deadline remained as stipulated on April 7, 2005, and the nine-month deadline expired in December of 2005 just as was represented by UTEX in its pleadings in this matter.

This Commission gave explicit instructions to the TPUC to complete the arbitration within 9 months, and TPUC failed to comply. Now the TPUC attempts to mislead the Commission to suggest that the delay is UTEX's fault. UTEX never waived – either explicitly or implicitly – any deadline. The effect of the Order Denying Preemption cannot be read to do anything other than functionally reset the clock. The TPUC's failure to complete the arbitration (which persists to this day, more than two months after the July 9 deadline) means that the TPUC has “failed to act.”

The Commission has no choice and no discretion. The law – both the statute and the Commission's own rules – compel only one result: an order preempting the TPUC's jurisdiction and then initiation of the FCC-level processes set out in 47 C.F.R. Part 51, Subpart I.

Very truly yours,

MUNSCH HARDT KOPF & HARR, P.C.

By: 
Patricia B. Tomasco

PBT:akm

Enclosure

¹ See UTEX February 8, 2006 Letter to Arbitrators, page 1 (“UTEX is the party that started the procedural schedule discussions with AT&T. UTEX sent a concrete proposal to AT&T on January 10. That proposal would have set the process in motion immediately by establishing September 3, 2005 as the deemed received date, with the result that January 16 would have been the 135th day, February 10th would have been the 160th day and the revised statutory deadline would have been May 31, 2006.”); p. 2-3 (“UTEX is willing to return to its original proposal. We are prepared to reset the clock”).



Control Number: 26381



Item Number: 99

Addendum StartPage: 0

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February 8, 2006

Honorable Andrew Kang
Honorable David Smithson
Public Utility Commission of Texas
1701 N. Congress Avenue
Austin, Texas 78701

Re: Docket No. 26381: *Petition of UTEX Communications Corporation for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1976, and PURA for Rates, Terms, and Conditions of Interconnection Agreement with Southwestern Bell Telephone Company*

Dear Judges Kang and Smithson:

I am writing on behalf of UTEX Communications Corporation ("UTEX") in response to AT&T Texas' January 17, 2006 letter in this case. AT&T's filing addressed matters that were the subject of extensive discussions between the parties. UTEX would have much preferred that the parties address their respective positions relating to timing and the schedule for this case in a joint filing, in simultaneous filings, or during a conference. AT&T was very much aware of this preference. Unfortunately, AT&T abruptly broke off the discussions and made their unilateral filing that painted UTEX's position in a negative way with a suggestion that only AT&T wants this case to be resolved quickly. That suggestion is wrong. UTEX has repeatedly and consistently asked that this matter be resolved as soon as possible.

After AT&T made its unilateral filing, we waited in anticipation that perhaps a conference could be held to resolve the scheduling dispute at which point we would clarify and explain UTEX's position plainly. At this point, however, it has become incumbent on us to respond in writing.

UTEX is the party that started the procedural schedule discussions with AT&T. UTEX sent a concrete proposal to AT&T on January 10. That proposal would have set the process in motion immediately by establishing September 3, 2005 as the deemed received date, with the result that January 16 would have been the 135th day, February 10th would have been the 160th day and the revised statutory deadline would have been May 31, 2006. UTEX also proposed specific dates going forward. Those dates, working backward, would have been:

Final Award: 5/31
Exceptions to Proposal for Award: 5/17
Proposal for Award: 5/3

Briefs: 4/3
HOM: 3/1 - 3/3.

AT&T responded that the general timelines were reasonable, but they did not want an immediate resumption. Instead, AT&T wanted to wait until the Arbitrators disposed of the pending motions for summary decision. The date of the ruling under their proposal would then be the 135th day. To be clear, UTEX proposed that schedule begin right away. There were specific dates for each milestone and a definite date for the Award. AT&T wants resumption to be put off until the pending motions are resolved. Any suggestion or implication that UTEX is seeking delay is mistaken.

UTEX responded to AT&T that if there were to be an indefinite date keyed to a ruling of some sort then it preferred to use the date the pending UTEX complaint (which will be re-filed through an amended complaint today in Docket 32041) is disposed of. AT&T claimed that such a starting date would not be appropriate. First, AT&T claimed that resolution of the issues in the complaint case would not be "of assistance" to the Arbitrators in this case because the complaint deals with the parties' existing contract. In our view, the complaint deals with issues that are absolutely involved in the arbitration - Intercarrier compensation for traffic to and from ESPs, ISDN interconnection, and Liquidated Damages/Performance standards.

UTEX is a small company with limited resources. A process that is long and complicated with multiple proceedings involving the same issues in a regulatory environment favors large companies like AT&T, not UTEX. Multiple, overlapping proceedings are far more costly to UTEX, whose principals are also trying to run a business. UTEX wants and deserves a contract and one that is honored and enforced rather than one that is repeatedly breached and therefore subject to the dispute resolution process. It is likely that the issues involved in the complaint will be disposed with reasonable dispatch. The ruling in the complaint will be informative because AT&T's position on the current contract ultimately boils down to a disagreement with what it says and a desire to secure changes to the agreement that mirror its positions in the arbitration. We will be arguing the same things in both cases.

A ruling on the motions for summary decision would be helpful, but is not a legal or practical necessity. Such motions are often filed and in many cases there is no ruling on them, with the result that the parties must try their cases without benefit of a ruling on the issues raised in the motions. If the decision is made to instead restart the clock only after some ruling is made, the triggering ruling should be the order which disposes of the complaint. That way the parties will not be simultaneously arguing over Intercarrier compensation for traffic to and from ESPs, ISDN interconnection and Liquidated Damages/Performance standards in two different cases. But if there must be two simultaneous proceedings, UTEX chooses to start now so they will finish sooner.

UTEX is willing to return to its original proposal. We are prepared to reset the clock in a way that will establish a date in the near future as day 135 and let the clock

Honorable Andrew Kang
Honorable David Smithson
Re: Docket No. 26381: UTEX/AT&T Arbitration

Page 3

begin to tick once again. UTEX will work with AT&T to flesh out a procedural schedule similar to the one we proposed on January 10. UTEX is re-filing its amended complaint in Docket 32041 today, so both the Arbitrators and AT&T should be aware that there will be two cases going at the same time involving Inter-carrier compensation for traffic to and from ESPs, ISDN interconnection, and Liquidated Damages/Performance standards.

We remain open to discussions about how this impasse can be resolved fairly and quickly. To that end, it may be helpful to have a conference to openly discuss this situation and resolve the procedure schedule promptly. Please let us know how you would like to proceed.

Sincerely,


W. Scott McCollough
Counsel for UTEX Communications
Corporation

Copy to: Andrew Jones, SBC